

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JASON S. BYERS

Claimant

V.

ACME FOUNDRY, INC.

Self-Insured Respondent

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Docket No. 1,056,474

ORDER

Claimant requested review of Administrative Law Judge Bruce Moore's July 9, 2013 Award. The Award indicated claimant was entitled to a 20% functional impairment to the body as a whole stemming from a May 19, 2011 accidental injury.

The Board heard oral argument on November 5, 2013. Patrick C. Smith, of Pittsburg, Kansas, appeared for claimant. Paul M. Kritz, of Coffeyville, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed the Board may consult the *AMA Guides*.¹

ISSUES

Claimant's Application for Hearing alleges a "general body disability" from "repetitive and cumulative work duties" on "January 4, 2011 and continuing through present."²

Claimant requests the Board modify the Award and find the date of accident to be January 4, 2011, when he was lifting a heavy pan with a coworker. Claimant requests benefits based on a functional disability of 22.5% to the body as a whole, as based on a split of the impairment ratings.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² Application for Hearing (filed June 24, 2011). The Employer's Report of Accident filed with the Director on January 13, 2011, references the date of accident as January 3, 2011 when claimant's back popped and began to hurt while lifting a pan.

Respondent maintains the Award should be affirmed. Respondent asserts the May 19, 2011 accident was the prevailing factor in causing claimant's injury, need for treatment, and resulting functional impairment because claimant received no significant medical treatment after January 4, 2011 and needed two lumbar spine surgeries after the May 19, 2011 accident.

The issues for the Board's review are:

- What is the date of accident?
- What is the nature and extent of claimant's disability?
- Is claimant entitled to an interest penalty pursuant to K.S.A. 44-512b?³

FINDINGS OF FACT

The Board adopts the facts as contained in the Award.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides that the burden of proof is on the claimant to establish his or her right to an award of compensation based on the whole record.

K.S.A. 2011 Supp. 44-508 provides, in part:

(f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:

. . .

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

³ This issue was not addressed at Regular Hearing, nor was it mentioned in the Award. The first reference to a claim being made for interest was in claimant's reply brief to the Board.

K.S.A. 44-512b(a) provides:

Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

K.S.A. 44-555c(a) states in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS

The Board adopts the analysis and conclusions of law as stated in the Award.

Additionally, “Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive.”⁴ Dr. Brown’s opinion that claimant’s second accidental injury was the direct and natural result of the first accidental injury is improbable and unreasonable. Dr. Brown contradicted himself by first indicating claimant’s impairment and disability was due to a May 19, 2011 accident, but later indicated claimant’s impairment and disability stemmed from the January 2011 accident.

While the Board could have taken the position that claimant was merely mistaken when he advised physicians that he was hurt lifting a heavy pan with a coworker on May 19, 2011, instead of having lifted the heavy pan in January 2011, the preponderance of the evidence demonstrates claimant’s second accident was the prevailing factor in his injury, medical condition, resulting disability and impairment. It is difficult to conclude the impetus in claimant’s injury, medical condition, resulting disability and impairment was the initial accident because he only had minimal medical treatment thereafter. The herniated discs were only identified after the second accident. Additional medical treatment did not occur until after the second accident, including the two lumbar surgeries.

⁴ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146, syl. ¶ 2 (1976).

Lastly, claimant's K.S.A. 44-512b request for an interest penalty was never presented to Judge Moore.

Under K.S.A. 44-512b, the time for requesting pre-award interest is at the time of the first full hearing (in this case, the regular hearing) or such other time as a hearing on the request can be scheduled and heard before an award is entered by the judge. That procedure allows the parties to present evidence on the issue of whether there was just cause or excuse to withhold payment. Here, claimant did not request a hearing on the issue as required by the statute. Here, claimant failed to request pre-award interest until he filed his reply brief to the Board. As such, claimant's argument that the minimum amount due should have been paid in advance of the award was not properly presented to the judge. K.S.A. 44-555(c)a mandates the Board's consideration be on issues presented to the judge. Issues not raised before the judge cannot be raised for the first time on appeal.⁵

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board affirms the July 9, 2013 Award.

AWARD

WHEREFORE, the Board affirms the July 9, 2013 Award.

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁵ See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 415, 416 P.2d 771 (1966).

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Honorable Bruce E. Moore